INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
Order of Planning Commission of Cleveland Heights, Ohio, validity of which is involved	2
Date of judgment and date of application for appeal	3
Nature of case and rulings of Court showing case is within jurisdiction provisions relied on	3
Statement of grounds upon which it is contended that the questions involved are substantial	5
Stage in proceedings at which, and manner in which the Federal questions sought to be reviewed were raised and way in which they were passed upon by Court	7
Cases believed to sustain jurisdiction	8
Appendix "A"—Opinion of the Supreme Court of Ohio	10

Table of Cases Cited

C., B. & Q. Rwy. v. *Drainage Comm.*, 200 U. S. 561	8, 9
Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282	8
Fox River Co. v. *R. R. Comm.*, 274 U. S. 651	9
Hooven & Allison Co. v. *Evatt*, 324 U. S. 651	9
King Mfg. Co. v. *Augusta*, 277 U. S. 100	8
Village of Euclid v. *Ambler Realty Co.*, 272 U. S. 365	5, 6
Village of University Heights v. *Cleveland Jewish Orphans' Home*, 20 F. (2d) 743	6
West Chicago Rrd. v. *Chicago*, 201 U. S. 506	8, 9
Zucht v. *King*, 260 U. S. 174	7, 8

Statutes Cited

Constitution of the United States 14th Amendment	2, 3, 8
Judicial Code, Section 237(a), (28 U. S. C. A. 344), as amended by the Acts of February 13, 1925, c. 229, Sec. 1, 43 Stat. 936; January 31, 1928, c. 14, 45 Stat. 54, and April 26, 1928, c. 404, 45 Stat. 466	1, 2, 5, 9

Page

Ohio General Code, Sections 4366-1 to 4366-12 (Throckmorton's Annotated Code, of Ohio, Baldwin's Certified Revision of 1945) 2

Revised Ordinances of the City of Cleveland Heights, Chapter III 3

BLEED THROUGH- POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 426

STATE OF OHIO EX REL., VAAD HACHINUCH HACHAREDI (TRADITIONAL EDUCATIONAL COUNCIL),
Appellant,

VS.

EDWIN C. BAXTER, WM. C. DUNLAP, SAMUEL E. KRAMER, FRED A. PEASE AND NORMAN KRICHBAUM, AS MEMBERS OF THE CITY PLANNING COMMISSION OF THE CITY OF CLEVELAND HEIGHTS, OHIO,
Appellees.

STATEMENT AS TO JURISDICTION

Pursuant to paragraph 1 of Rule 12 of this Court, appellant presents the following statement as to the basis upon which this Court has jurisdiction upon appeal to review the judgment of the Supreme Court of Ohio involved herein:

A. Statutory Provisions Sustaining Jurisdiction

This is an appeal by Vaad Hachinuch Hacharedi (hereinafter referred to as appellant) under Section 237(a) of the Judicial Code, U.S.C.A., Title 28, Section 344 (as amended by the Act of February 13, 1925, ch. 229, Section

1, 43 Stat. 936) and under the Act of January 31, 1928, ch. 14, 45 Stat. 54, and the Act of April 26, 1928, ch. 440, 45 Stat. 466, from a final judgment in a suit in the highest court of the State, to-wit, the Supreme Court of the State of Ohio, in which suit there was drawn in question the validity of a certain order, legislative in character, of the Planning Commission of the City of Cleveland Heights, Ohio, on the ground that said order was repugnant to the Constitution of the United States, particularly the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, providing, in part, that no State shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

B. Order of Planning Commission of Cleveland Heights, Ohio, Validity of Which Is Involved

The order of the Planning Commission of Cleveland Heights, Ohio, was an order made and entered on October 24, 1945 denying to appellant the use of its property at 14298 Superior Road, Cleveland Heights, Ohio, for school purposes (R. 41-42).

Said Planning Commission is a commission created under Chapter III of The Revised Ordinances of the City of Cleveland Heights enacted pursuant to the provisions of Section 4366-1 to 4366-12, both inclusive, of the Ohio General Code (Throckmorton's Annotated Code of Ohio, Baldwin's Certified Revision of 1945). The pertinent provisions of which may be summarized as follows: the Planning Commission is authorized to divide the municipality into zones, in the interest of public health, safety, convenience, comfort, prosperity or general welfare, for the limitation and regulation of the use of structures and premises in such zones.

Said Planning Commission, in making its said order,

BLEED THROUGH– POOR COPY

acted under Chapter III of The Revised Ordinances of The City of Cleveland Heights, Ohio, enacted pursuant to the provisions of Sections 4366-1 to 4366-12, both inclusive, of the Ohio General Code.

C. Date of Judgment and Date of Application for Appeal

The judgment sought to be reviewed was made and entered on the 2nd day of July, 1947.

The Petition for Appeal was presented by appellant and filed on September 26, 1947.

D. Nature of Case and Rulings of Court Showing Case Is Within Jurisdictional Provisions Relied On

The hearing before the Planning Commission was instituted by appellant by a written application for a permit to use its premises for a school.

After the hearing the Planning Commission issued its order denying such permit to appellant.

Following such denial appellant instituted proceedings in Mandamus against the Planning Commission in the Court of Appeals for Cuyahoga County, Ohio. In its petition in said proceedings appellant, specifically and in appropriate detail, drew in question the validity of the Commission's said order on the ground that the same violated the rights of appellant under Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 8).

Said Court of Appeals of Cuyahoga County, on August 12, 1946, by unanimous vote of its three justices, granted appellant's petition and ordered a peremptory writ of mandamus to issue against said Commission directing them to issue a permit authorizing appellant to use its certain property for school purposes.

Thereafter, on August 15, 1946, said Commission filed its Notice of Appeal to the Supreme Court of Ohio, and said

case was reviewed by the Supreme Court of Ohio as a matter of right, the action having originated in a Court of Appeals.

Thereupon, on January 15, 1947, said appeal was argued before said Supreme Court of Ohio, at which time appellant again drew in question the validity of the Commission's said order on the ground that the same violated the rights of appellant under Section 1 of the Fourteenth Amendment to the Constitution of the United States (Appellee's Brief in Supreme Court of Ohio, entire "Argument").

Thereafter, pursuant to order of the Supreme Court of Ohio, said appeal was reargued on April 23, 1947, at which time appellant reiterated its original position wherein it drew in question the validity of the Commission's said order on said Federal constitutional grounds.

Thereupon said Supreme Court of Ohio, on July 2, 1947, by the decision of five of its justices, reversed the judgment of the Court of Appeals and rendered final judgment in favor of the Commission, holding that the Commission was justified in its refusal to issue a permit to appellant to use its property for school purposes. The majority opinion of said Ohio Supreme Court referred to appellant's claim of rights and immunities under the United States Constitution, but did not pass upon the same in any manner.

The minority opinion of the dissenting justices held that the Commission had applied the zoning ordinance in an unreasonable, arbitrary and discriminatory way in that the refusal of the Commission to grant a permit to appellant for a school had no substantial relation to the health, safety, morals or general welfare of the community.

The judgment of the Supreme Court of the State of Ohio entered on July 2, 1947, was a judgment in said suit in the highest court of the State of Ohio in which a decision in said suit could be had, and constitutes a final judgment of

BLEED THROUGH– POOR COPY

said court within the meaning of Section 237(a) of the Judicial Code (U.S.C.A., Title 28, Sec. 344).

Whereupon, on September 26, 1947, appellant filed with the Supreme Court of Ohio a petition for appeal to this Court, together with its assignment of errors, in which petition appellant drew in question the validity of said order of the Planning Commission as being repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States. In said assignment of errors appellant charged error in said judgment and decision of said State court in holding and deciding in favor of the validity of the order of the Planning Commission, notwithstanding such order, under color of said state statutes and municipal ordinances, was repugnant to said provision of the Constitution of the United States, and in failing to hold and decide that said order of the Planning Commission constituted a deprivation of appellant's property rights in violation of said provisions of the Constitution of the United States. On September 29, 1947 the Chief Justice of the Supreme Court of the State of Ohio made an order allowing the appeal.

Appellant will urge in this Court each point made in its said assignment of errors.

E. Statement of Grounds upon Which It Is Contended That the Questions Involved Are Substantial

The questions involved go to the very heart of the right of educational institutions to use their property in municipalities where there are in existence zoning ordinances similar to those of Cleveland Heights, Ohio.

In the most concise terms, the contentions of appellant with reference to said questions may be summarized as follows:

1. Ever since the decision of the Supreme Court of the United States in *Village of Euclid* v. *Ambler Realty Co.*,

272 U. S. 365, many municipalities have either enacted or amended zoning ordinances patterned after the ordinance under consideration in that case. This is particularly true of the municipalities in Ohio neighboring the Village of Euclid. Indeed, the zoning ordinance of the City of Cleveland Heights is, with the exception of a few immaterial provisions, identical in words and figures with the Euclid ordinance.

2. The effect of the decision in the *Ambler Realty case, supra,* has been to put the stamp of constitutional validity upon similar ordinances, with the result that municipalities have felt at liberty to apply such ordinances in any manner they see fit, whether or not there is substantially affected the health, safety, morals or general welfare of the community, (e.g., *Village of University Heights* v. *Cleveland Jewish Orphans' Home,* 20 Fed. (2d) 743, Sixth Circuit Court of Appeals.) At the same time, sight has been lost of the fact that this Court, in the *Ambler Realty case, supra,* validated the zoning ordinance in its "general scope" only, specifically qualifying and limiting its ruling in the following language, at page 391:

> "It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises . . . or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable."

3. The order of the Planning Commission, under color of such an ordinance, denies to appellant the equal protection of the laws in that it is not based upon considerations of health, safety, morals or general welfare, but is purely arbitrary and unreasonable. The legalization of such denial would sanction similar arbitrary action by other

BLEED THROUGH– POOR COPY

municipalities, there having been no decision by this Court on the questions reserved with the qualifications limited in the *Ambler Realty case* since it was decided by this Court.

4. The order of the Planning Commission, under color of such an ordinance, confiscates appellant's property in that the zoning ordinance specifically provides for the location of schools in single-family residence districts, but at the same time limits and restricts their location therein without any relationship to public health, safety, morals or general welfare. No specific provision for their location in any of the other zone districts is made. The entire matter is left to interpretation by the Law Director of the municipality, as he himself testified (R. 109).

5. Appellant is part of a national organization which is sponsoring schools throughout the country, and the arbitrary action of the Planning Commission of Cleveland Heights prevents it from conducting a school for residents of Cleveland Heights, such prevention having no basis in considerations of public health, safety, morals or general welfare.

The considerations above set forth, particularly the reservations made by this Court in the *Ambler Realty case, supra,* indicate the case is one in which the Federal questions involved are substantial in accordance with the decision of this Court in *Zucht* v. *King,* 260 U. S. 174, 176-77.

F. Stage in Proceedings at Which, and Manner in Which, the Federal Questions Sought to Be Reviewed Were Raised and Way in Which They Were Passed upon by Court.

The Federal questions sought to be reviewed were first raised by appellant in its petition filed in the court of original jurisdiction, i.e., the Court of Appeals of Cuyahoga

County, Ohio, which was the first stage in any legal proceedings which could be instituted by appellant. In said petition appellant set forth, with appropriate particularity and in full detail, that said order of the Planning Commission, under color of said ordinance, and said ordinance as so enforced, were in violation and derogation of the provisions of Section 1, Article XIV of the Amendments to the Constitution of the United States in that thereby relator is deprived of its property without due process of law. Said petition will be a part of the record herein.

In its answer brief, as appellee, before the Supreme Court of Ohio and in its oral argument before said Court on January 15, 1947 and again on reargument ordered by said Court for April 23, 1947, appellant reiterated its contentions under said provisions of the Constitution of the United States.

In its decision of July 2, 1947, the Supreme Court of Ohio took note of said contentions under said provisions of the Constitution of the United States, but failed to pass upon them. The necessary effect of the judgment of the Supreme Court of Ohio is to deny to appellant the Federal rights and immunities so specially claimed by it, which, if recognized and enforced, would require a judgment different from the one rendered which rests upon a ground of local or general law. (*C. B. & Q. Rwy.* v. *Drainage Comm.*, 200 U. S. 561, first syllabus; *West Chicago Railroad* v. *Chicago*, 201 U. S. 506, first syllabus.)

G. Cases Believed to Sustain Jurisdiction

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Zucht v. *King*, 160 U. S. 174, 176;
King Mfg. Co. v. *Augusta*, 277 U. S. 100;
Dahnke-Walker v. *Bondurant*, 257 U. S. 282;

BLEED THROUGH– POOR COPY

C. B. & Q. Rwy. v. *Drainage Comm.*, 200 U. S. 561, 580-81;
West Chicago Rrd. v. *Chicago*, 201 U. S. 506, first syllabus;
Fox River Co. v. *R. R. Comm.*, 274 U. S. 651, 653-54;
Hooven & Allison Co. v. *Evatt*, 324 U. S. 652, 659

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 237(a) of the Judicial Code, as amended by the Act of February 13, 1925 (ch. 229, 43 Stat. 936, Sec. 1, U. S. C. A., Title 28, Section 344), and under the Act of Jan. 31, 1928, ch. 14, 45 Stat. 54, and the Act of April 26, 1928, ch. 440, 45 Stat. 466.

Respectfully submitted,

GABRIEL LEEB,
Attorney for Appellant.

APPENDIX "A"

Statement of the Case

THE STATE ex rel., VAAD HACHINUCH HACHAREDI, *Appellee,*

vs.

BAXTER et al., CLEVELAND HEIGHTS CITY PLANNING AND ZONING COMMISSION, *Appellants.*

Mandamus—Relator must show refusal to perform act specially enjoined as duty—Municipal zoning commission not required to issue building permit—Authorizing use of residence property for school purposes—Zoning ordinance prohibited such use unless public convenience and welfare served—And appropriate use of neighboring property not substantially and permanently injured.

1. To entitle a relator to a writ of mandamus the evidence must show a refusal to perform an act which the law specially enjoins as a duty resulting from an office, trust or station.

2. In the absence of evidence of an abuse of discretion a writ of mandamus will not be issued to compel a municipal zoning commission to issue a permit to an owner of residence property authorizing its use for school purposes under a valid ordinance prohibiting such use unless in the judgment of the commission the public convenience and welfare will be served and the appropriate use of neighboring property will not be substantially and permanently injured thereby.

(No. 30830—Decided July 2, 1947)

Appeal from the Court of Appeals for Cuyahoga County.

The relator is a corporation not for profit, organized under the laws of this state for the purpose of maintaining institutions of learning for public instruction in both religious and secular subjects.

The five respondents are the members of the planning commission of the city of Cleveland Heights, Ohio.

This action was instituted in the Court of Appeals to obtain a writ of mandamus to compel the respondents to

BLEED THROUGH– POOR COPY

issue a permit authorizing the relator to use certain property for school purposes. In its petition the relator alleges that the refusal of the respondents to issue a permit is an abuse of discretion and is violative of the provisions of the federal and state constitutions.

The Court of Appeals held that "no valid excuse or reason exists for not" issuing a permit, and a writ of mandamus was allowed.

Having originated in the Court of Appeals, the case is in this court for review on an appeal as a matter of right.

Mr. Gabriel Leeb, for appellee.

Mr. G. E. Hartshorn, for appellants.

Weygandt, C. J. Does the record disclose evidence tending to show that the respondents were guilty of an abuse of discretion in refusing to issue a permit to the relator to use its residence property for school purposes?

The relator's property is a single family residence located at the southwest corner of Superior and Hampshire roads in the city of Cleveland Heights. The parcel of land has a frontage of 220 feet on the first street and 164 feet on the second.

Under the provisions of the zoning ordinance of that city the property is in a class U-1, or single family, district. The ordinance reads in part as follows:

"Section 4. Single Family House District. • • •

"(a) In a class U-1 district no building shall be used and no building shall be erected which is arranged, intended or designed for a use enumerated in subdivision two (2) of class U-1 uses, unless such dwelling is located:

"(1) On a lot already devoted to a use enumerated in said subdivision, providing said devoted use is not a 'nonconforming' use.

"(2) On a lot fronting on a portion of a street between two intersecting streets in which portion there exists premises devoted to a class U-7 use.

"(3) On a lot immediately adjoining or immediately opposite on the other side of the street from a class U-4 or U-5 district, or

"(4) On a lot determined by the City Planning and Zoning Commission after public notice and hearing to be so located that such building will in the judgment of the City Planning and Zoning Commission substantially serve the public convenience and welfare, and will not substantially and permanently injure the appropriate use of a neighboring property."

It is conceded that the relator's property does not meet the conditions of any of the first three paragraphs and that the sole question is whether the respondents are required to issue a permit by reason of the provisions of paragraph four.

It is conceded, too, that the zoning ordinance itself is constitutional. But it is insisted that the respondents have applied the provisions of the ordinance in such an arbitrary and unreasonable manner as to violate the guaranties of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Sections 1, 2 and 19 of Article I of the Constitution of Ohio.

Would the use of the relator's property for school purposes "substantially serve the public convenience and welfare, and * * * not substantially and permanently injure the appropriate use of neighboring property"?

The evidence discloses that this residential section of the city is in a U-1, or single family, district, and is improved with well kept homes occupied in most instances by the owners. However, there are several nonconforming uses. These consist of a two-story, four-suite apartment and one or two two-family houses, all of which were constructed before the zoning ordinance was adopted in the year 1921. Likewise, on the northwest corner of Superior and Hampshire roads is an old church—a frame building—which was erected previous to the adoption of the zoning ordinance. But there is no evidence that there has been a failure to maintain the character of the district since the ordinance became effective.

At the hearing before the planning commission it was stated on behalf of the relator that not more than 25 students were expected to attend the school. However, the record discloses testimony by one of the relator's witnesses that

BLEED THROUGH– POOR COPY

the house would accommodate 75 to 100 students. Another of the relator's witnesses testified that the house could accommodate 125 to 150 students.

Furthermore, there is testimony that the use of the relator's property for school purposes would substantially and permanently injure the appropriate use of the neighboring property and lower its value.

The relator relies upon the decision of this court in the case of State, ex rel. Synod of Ohio of United Lutheran Church, *v.* Joseph, et al., Village Comm., 139 Ohio St., 229, 39 N. E. (2d), 515, 138 A. L. R., 1274. However, a study of the particular facts in that case discloses a marked contrast with those in the instant controversy. Reduced to its lowest terms, the decision in that case was based upon the extremely important and unusual fact that the relator had been misled by the zoning and village commissions of the village of Upper Arlington. The relator had applied twice for a permit to build a church. Each application involved a different site. The respondents denied both requests. Thereafter the respondents passed a resolution stating that certain other sites would be available for church purposes and that if an application were made for a permit to build on one of them, it would be granted. The relator accepted the respondents' suggestion in good faith and purchased one of the recommended sites. Then an application was made for a building permit. But it, too, was denied. The relator then sought a writ of mandamus to compel the issuance of the permit on the ground that the refusal was "unreasonable, arbitrary, unwarranted, confiscatory and a restraint upon the freedom of worship." The Court of Appeals properly allowed the writ, and the judgment was affirmed by this court.

There is no such circumstance in the instant case. This relator purchased the residence property on its own initiative and without suggestion or representation of any sort by the respondents. Furthermore, it is not contended that there is no available school site in convenient adjacent zones.

The record discloses no evidence of an abuse of dis-

cretion by the respondents in refusing to issue a permit to the relator to use its residence property for school purposes. To entitle the relator to a writ of mandamus the evidence must show a refusal to perform "an act which the law specially enjoins as a duty resulting from an office, trust, or station." Section 12283, General Code.

The judgment of the Court of Appeals is reversed and final judgment is rendered for the respondents.

Judgment reversed.

Turner, Matthias, Hart and Stewart, JJ., Concur.
Zimmerman and Sohngen, JJ., Dissent.

ZIMMERMAN, *J.*, dissenting:

Applying to the instant case the principles announced and approved by this court in State, ex rel. Synod of Ohio of United Lutheran Church, *v.* Joseph, et al., Village Comm., 139 Ohio St., 229, 39 N. E. (2d), 515, 138 A. L. R., 1274, and upon authority of the cases cited and relied on in that case, the judgment of the Court of Appeals herein should be affirmed.

In 1940 the Russell Sage Foundation published a book by Edward M. Bassett entitled "Zoning," in which the author traces the history and development of the law of zoning in the United States. At page 70 of the text the following comment is made:

"When in 1916 the framers of the Greater New York building zone resolution were discussing what buildings and uses should be excluded from residence districts, it did not occur to them that there was the remotest possibility that churches, schools and hospitals could properly be excluded from any districts. They considered that these concomitants of civilized residential life had a proper place in the best and most open localities."

In my opinion, residential communities which are too sensitive to welcome such cultural, educational and character-building institutions as churches and schools should

BLEED THROUGH– POOR COPY

protect themselves by private restrictions rather than by resort to zoning ordinances.

Of course the power of municipalities to establish zones is a police power, and police power is the public right of reasonable regulation for the common good, which may not be extended arbitrarily beyond that purpose.

Hence, zoning ordinances restricting the use of property to be valid and enforceable must bear a substantial relation to the health, safety, morals or general welfare of the community. City of Youngstown *v.* Kahn Bros. Bldg. Co., 112 Ohio, St., 654, 148 N. E., 842, 43 A. L. R., 662; Women's Kansas City St. Andrew Soc. *v.* Kansas City, Mo. (C. C. A. 8), 58 F. (2d), 593.

A zoning ordinance of the character now before us, by which a school is excluded from a residential district of a designated kind, is applied in an unreasonable, arbitrary and discriminatory way, where under the particular facts it does not appear that the exclusion of a school from such a district has any substantial relation to the *health, safety, morals or general welfare* of the community. City of Sherman *v.* Simms, 143 Tex., 115, 183 S. W. (2d), 415.

Although in the instant controversy a number of witnesses, mostly property owners in the immediate neighborhood, testified that in their opinion the establishment of relator's school would reduce the value of surrounding real estate and would result in noise and confusion, I can find no tangible evidence in the record indicating that the presence of the school would adversely affect the health, safety, morals or general welfare of the residents of the district.

The testimony and photographs attached to the bill of exceptions as exhibits represent relator's property in Cleveland Heights as consisting of a large house in spacious grounds with a sizable garage in the rear of the house and with a stone wall partially surrounding the premises.

As I view the matter, the planning commission of the city of Cleveland Heights acted unreasonably, arbitrarily and in a discriminatory manner in denying relator the use of its property in issue for a parochial school of modest size,

especially in face of the fact that schools had been allowed in other zones of the municipality of the same classification as the one involved here.

Upon the record and under the authorities, the Court of Appeals was justified in rendering the judgment it did and I can discover no good reason for disturbing such judgment.

Sohngen, J., concurs in the foregoing dissenting opinion.

BLEED THROUGH– POOR COPY

INDEX.

The Case 2

The Validity of a State Statute is Drawn in Question.. 3

The Decision of the Supreme Court of Ohio Was in Favor of the Validity of the Statute in Question.. 7

AUTHORITIES CITED.

Cases.

C. B. & Q. Rwy. v. Drainage Commissioners, 200 U. S. 561 8

Dahnke-Walker Co. v. Bondurant, 257 U. S. 282..... 11

Fiske v. Kansas, 274 U. S. 380 11

Fox River Co. v. R. R. Comm., 274 U. S. 651..... 10

Nectow v. Cambridge, 260 Mass. 441 4

Nectow v. Cambridge, 277 U. S. 183 ..... 3, 7

New Orleans Water Works v. Louisiana Sugar Refining Co., 125 U. S. 18 ..... 3, 5

Village of Euclid v. Ambler Realty Co., 272 U. S. 365.. 3-4

West Chicago Railroad v. Chicago, 201 U. S. 506..... 10

Statutes.

Ohio General Code:

~~Section 237(a)~~ ..... ~~2, 7~~

Sections 4366-7 ..... 1, 3

BLEED THROUGH- POOR COPY

In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

STATE OF OHIO, *ex rel.*,
VAAD HACHINUCH HACHAREDI
(Traditional Educational Council),

Appellant,

vs.

EDWIN C. BAXTER, WM. C. DUNLAP, SAMUEL E. KRAMER,
FRED A. PEASE and NORMAN KRICHBAUM,
As Members of the City Planning Commission of the
City of Cleveland Heights, Ohio,

Appellees.

BRIEF OF APPELLANT
In Opposition to Motion to Dismiss or Affirm.

This brief is filed pursuant to Rule 7, Paragraph 3, of the Rules of this Court, in opposition to a motion to dismiss or affirm contained in a typewritten document entitled "Statement of Appellees Against Jurisdiction, Including Motion to Dismiss Appeal and Affirm Judgment" filed by appellees with the clerk of the Ohio Supreme Court on October 14, 1947.

The sole ground of said motion is that the judgment of the Supreme Court of Ohio does not draw into question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States.

It being conceded by appellees that the zoning ordinance in question, having been enacted pursuant to authority granted by the Ohio State Legislature in Ohio General Code Sections 4366-7 *et seq.*, is a "statute" within the

meaning of Section 237(a) of the Judicial Code, the issues raised by appellees' motion are:

Does the judgment of the Ohio Supreme Court draw into question the validity of such "statute" on the ground of its repugnancy to the Constitution of the United States?

Was the decision in favor of its validity?

THE CASE.

Appellant, an Ohio corporation not for profit, is the owner of real estate in the City of Cleveland Heights, Ohio. It is part of a national educational organization which sponsors Orthodox Jewish schools throughout the country. Appellant sought to use said property for such school purposes. Appellees refused to permit such use under color of a zoning ordinance.

After hearing, a peremptory writ of mandamus was issued by the Court of Appeals of Cuyahoga County, Ohio, upon concurrence of its three justices, ordering appellees to permit such use of the property.

The Supreme Court of Ohio, two justices dissenting, reversed the judgment of the Court of Appeals and rendered final judgment for appellees.

Appellant's suit was based upon the claim of repugnance of the ordinance, as so applied, to the United States Constitution and the Constitution of the State of Ohio, for the reason that appellant was deprived of the use of its property by considerations having no substantial relation to the public health, safety, morals, or general welfare; and that other schools had been permitted to locate in the same class of use districts as the one wherein appellant's property is located, appellant's property being on the border of such use district.

BLEED THROUGH– POOR COPY

THE VALIDITY OF A STATE STATUTE IS DRAWN IN QUESTION.

It is urged by appellees that no legislation is under attack in this case, and hence the judgment is not subject to review by this Court upon Appeal. In support of this contention it is stated (page 6 of appellees' motion), "The Commission does not set up the use districts." Then there follows a lengthy quotation from *New Orleans Water Works v. Louisiana Sugar Refining Co.*, 125 U. S. 18.

It is necessary to quote from Section 4366-7 of the Ohio General Code to indicate the inaccuracy of the appellees' statement as to the creation of the use districts.

> "The city planning commission of any municipality shall have the power to frame and adopt a plan or plans for dividing the municipality or any portion thereof into zones or districts, representing the recommendations of the commission, in the interest of the public health, safety, convenience, comfort, prosperity or general welfare, for the limitation and regulation of the height, the bulk and location (including percentage of lot occupancy, set back building lines, and area and dimensions of yards, courts and other open spaces), and the uses of buildings and other structures and of premises in such zones or districts. The council of any village is hereby empowered to create and appoint a planning commission with the powers set forth in this act."

Before indicating the inapplicability of the *New Orleans Water Works* case, *supra*, to the case at bar, it will be helpful to advert to *Nectow v. Cambridge*, 277 U. S. 183. The latter case more nearly parallels the case at bar and serves to point up the distinction to be observed in the former case.

In *Nectow v. Cambridge, supra*, on error (now appeal) to the Massachusetts Supreme Court, this Court had before it a zoning ordinance of the same general character as that considered in *Village of Euclid v. Ambler Realty*

Co., 272 U. S. 365. The ordinance was "conceded to be constitutional within that decision." The attack upon the ordinance was that, "as specifically applied to plaintiff in error, it deprived him of his property in contravention of the Fourteenth Amendment."

While the nature of the suit is described on page 186 of the opinion as one for "mandatory injunction directing the city and its inspector of buildings to pass upon an application of plaintiff in error for a permit to erect any lawful buildings * * * without regard to the provisions of the ordinance * * *," we believe it is sufficiently important to present a more detailed account of the proceedings as they are set forth by the Massachusetts court in 260 Mass. 441, 446:

> "After the passage of the ordinance, the plaintiff applied to the city government for an amendment to the zoning ordinance so as to reclassify the locus as business or unrestricted land. This application was denied. Thereafter, he applied to the superintendent of buildings of the defendant city for a permit to construct a building essentially different from any allowed by the ordinance but otherwise lawful. He declined to issue such permit and thereupon the plaintiff, pursuant to G. L. c. 40, par. 27, and St. 1924, c. 133, petitioned the board of appeals to vary the application of the ordinance so as to permit the plaintiff to erect a business building on the locus. This was refused. Thereupon the present suit was brought."

It will be observed at once that neither the superintendent of buildings nor the zoning board of appeals did any legislating; nor can they be said to be legislative arms of the municipality. Obviously, the reason this Court took jurisdiction on error (now appeal) was that the ordinance "as specifically applied to plaintiff in error" deprived him of his property in contravention of the Federal Constitution. The "application" to plaintiff's property took place when these administrative officials refused to permit plain-

BLEED THROUGH– POOR COPY

tiff to use his property. Such refusal, in turn, was based upon the authority of the ordinance questioned.

So in the case at bar, the appellees, the Planning Commission which by state statute zoned appellant's property, enforced the zoning ordinance against appellant's property. And the claim of appellant is, as in the *Nectow* case, *supra*, that the restriction thereby imposed "does not bear a substantial relation to the public health, safety, morals, or general welfare." In the case at bar, too, the suit was directed against the appellees to issue a permit for the use of its property. Here, too, appellees' refusal was based upon the ordinance in question; the minutes of their meeting disclosing a recital *in haec verbae* of the language of the ordinance—and nothing more of substance or materiality—as the ground for their refusal to permit appellant to use its property. (Transcript, page 68 (Ohio Supreme Court Record, page 41).)

A discussion of the merits of the case is not generally called for in proceedings to determine jurisdiction. However, inasmuch as appellees contend (page 5 of their motion) that schools are permitted in zone districts U-2, U-3, U-4, U-5, U-6, and U-7, and also state (page 4) that U-1 uses are permitted in all other use districts, we must point out that the law-director of the municipality testified on cross examination that, as applied to schools, such permissive use in other districts has been subject to his interpretation of the language of the ordinance. (Transcript, pages 133-136 (Ohio Supreme Court Record, pages 106-109).) Property rights should be fixed and determined, and ought not be dependent upon the evanescence of interpretations made by a law-director, no matter how capable or well-intentioned a particular incumbent may be.

The inapplicability of the case quoted by appellees in support of their motion to dismiss, *New Orleans Water Works v. Louisiana Sugar Refining Co., supra*, becomes apparent when it is reduced to its essential elements, invok-

ing, as it does, the constitutional guarantee against the impairment of the obligation of contracts.

In that case the plaintiff had a charter from the State of Louisiana, in effect a contract, granting to it a franchise to supply and sell water from a river. That contract contained a qualifying condition, subjecting the franchise to subsequent grants by the city of New Orleans, to any person contiguous to the river, of the privilege of drawing water from the river for his own use. The plaintiff complained that the action of the city in granting such privilege to defendant impaired the obligation of its contract in contravention of the Federal Constitution.

Obviously, there was no legislation involved in the impairment of the obligation of the contract, if there was such impairment. Obviously, too, the propriety of the city's action in granting to the defendant the privilege of drawing water from the river had to be determined solely within the framework of the qualifying condition contained in that very same contract. As stated by this Court, page 31, the question "depended wholly on the law of the State," —i.e., on the charter granted plaintiff by enactment of the state legislature. The contract for which plaintiff sought protection contained its own qualifying limitations. Whether the limitations imposed by the city came within the terms of the qualification depended upon the construction of the language of the charter. This was therefore quite properly confined to the state courts.

The purport of this decision can be illustrated in yet another manner: If the charter, or "contract," had contained no qualifying limitation, and the city had granted to defendant the privilege of drawing water for its own use, and such grant had been based upon some other enabling state statute, then there would have been a basis for a complaint that the obligation of the contract had been impaired.

BLEED THROUGH– POOR COPY

However, in the case at bar, as in the case of *Nectow v. Cambridge, supra,* the rights of the property owners are derived, in the first instance, from the guarantee in the Fourteenth Amendment to the United States Constitution. The ordinance under attack deprived the owners of that property by restrictions which bore no "substantial relation to the public health, safety, morals, or general welfare," as contended by appellant and as stated in the minority opinion of the Supreme Court of Ohio (Transcript, page 200). That the ordinances in both cases may have been necessarily administered by others than legislative officials, and that the suits were therefore necessarily brought against such officials, does not deprive the suits of their attributes as proceedings attacking the constitutional invalidity of the ordinances as applied to such owners. Consequently they come within the purview of Section 237(a) of the Judicial Code and are subject to review on appeal.

THE DECISION OF THE SUPREME COURT OF OHIO WAS IN FAVOR OF THE VALIDITY OF THE STATUTE IN QUESTION.

The question then arises as to the scope of the judgment of the Ohio Supreme Court within the area defined by Section 237(a) of the Judicial Code.

The statement is made, and underscored, in appellees' motion (page 3) that "The validity of the ordinance itself has not been attacked in this case." That is not correct. The original petition in mandamus filed by appellant (Transcript, page 35 (Ohio Supreme Court Record, page 8)), alleges that

> "* * * said ordinance as so enforced (by appellees) is in violation and derogation of the provisions of Section 1, Article XIV of the Amendments to the Constitution of the United States in that thereby (appellant) is deprived of its property without due process of law."

The writ of mandamus was ordered to issue by unanimous decision of the three justices of the Court of Appeals of Cuyahoga County, Ohio.

The Ohio Supreme Court, upon appeal by appellees, reversed that judgment and rendered final judgment for appellees, two of the justices dissenting.

In the majority opinion (Transcript, page 195) the Ohio Supreme Court makes the following statement:

> "It is conceded, too, that the zoning ordinance itself is constitutional. But it is insisted that the respondents have applied the provisions of the ordinance in such an arbitrary and unreasonable manner as to violate the guaranties of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Sections 1, 2 and 19 of Article I of the Constitution of Ohio."

The opinion thereafter makes no further reference to the issue thus raised by appellant. The opinion goes on to a review of the evidence (part of which is inaccurately set forth) and concludes with a finding that appellees did not abuse their discretion in refusing to permit appellant to use its property for school purposes.

In *C. B. & Q. Rwy. v. Drainage Commissioners*, 200 U. S. 561, this Court was called upon to determine its jurisdiction in a case appealed from a state court wherein the state court failed to pass upon the Federal right specially set up in the record.

It was contended that, the state court having based its judgment on the common law, and not expressly on any Federal ground, it could not be said there was any denial of the Federal right claimed; that consequently this Court was without jurisdiction to reexamine the judgment.

Answering this contention, Justice Harlan stated, page 580:

> "But it is equally well settled that the failure of the state court to pass on the Federal right or immunity

BLEED THROUGH– POOR COPY

specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law. And such plainly was the effect of the judgment in this case. If, as the railway company contended, the proposed (581) action of the Drainage Commissioners would deprive it of property without due process of law and also deny to it the equal protection of the laws, then a judgment should have been rendered for the company. *And that result could not be avoided merely by silence on the Federal question and by placing the judgment on some principle of the common law* * * *. The claim of a Federal right or immunity specially set up from the outset went to the very root of the case and dominated every part of it. If that claim be valid, then the law is for the railway company; for, the supreme law of the land must always control. *Therefore a failure to recognize such Federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied.* That claim having, then, been distinctly set up by the company, and being broad enough to cover the entire case, it may not be ignored, *and this court cannot refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States.*" (Emphasis added.)

The claim of a Federal right in the case at bar goes "to the very root of the case and dominated every part of it." It was the basis of appellant's petition for a writ of mandamus. It was the basis for appellant's argument in the Court of Appeals and in the Ohio Supreme Court. The effect of the judgment of the Ohio Supreme Court is to deny to appellant the use of its property, in derogation of its Federal Constitutional right, so specially pleaded and urged at every stage of the case.

To the same effect is the decision in *West Chicago Railroad v. Chicago*, 201 U. S. 506, the first syllabus of which reads as follows:

> "Although the judgment of the state court rests partly on grounds of local or general law, and although the opinion may not expressly refer to the Constitution of the United States, if by its necessary operation the judgment rejects a claim, based on a constitutional right specially set up in the answer, that the relief prayed cannot, in any view of the case, be granted consistently with the contract or due process clauses of the Constitution, this court has jurisdiction to review."

And later, in *Fox River Co. v. R. R. Comm.*, 274 U. S. 651, this Court, speaking through Justice Stone, held, page 653:

> "The right set up in the bill is one under the Federal Constitution. *Whether the state court denied that right or failed to give it due recognition is a question upon which plaintiffs are entitled to invoke the judgment of this Court.* Our jurisdiction is not affected because the existence of the right for which constitutional protection is claimed depends upon state law." (Emphasis added.)

The judgment of the Ohio Supreme Court cannot, in any view of the case, be held to be consistent with the due process clause of the Federal Constitution, denying to appellant, as it does, the use of its property; when such denial sanctions an ordinance, the applicable provisions of which bear no substantial relation to the public health, safety, morals, or general welfare. And this is so even though the court failed to pass upon that specific point, notwithstanding the fact it was urged in so many words in appellant's argument before the court, as the court itself states.

Further authority for the jurisdiction of this Court in the instant case, the effect of the judgment of the Ohio

BLEED THROUGH- POOR COPY

Supreme Court being to enforce the zoning ordinance against appellant, is to be found in *Fiske v. Kansas*, 274 U. S. 380, 385:

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under Sec. 237 of the Judicial Code. The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented."

This is not the proper stage in the proceedings to make a presentation of the substantive law involved. However, it is proper, we believe, to point out here that our contention at every stage of the case was: notwithstanding the general constitutional aspect of zoning ordinances, the ordinance in question was constitutionally invalid as it affected appellant.

> "A statute may be invalid as applied to one state of facts and yet valid as applied to another. Besides, a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage." (*Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, 289.)

The rejection of that claim by the Ohio Supreme Court, no matter how phrased, "has the same effect as if the claim of Federal right or immunity had been expressly denied."

The judgment of the Supreme Court of Ohio is in a suit where was drawn in question the validity of a statute of the State of Ohio on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity. The Supreme Court of the United States therefore has jurisdiction to review such judgment upon appeal, and we respectfully submit that ap-

pellees' motion should be denied and that the appeal be heard on the merits, on brief and argument.

Respectfully submitted,

EZRA SHAPIRO,
GABRIEL LEEB,
Attorneys for Appellant.

Dated at Cleveland, Ohio, this 30th day of October, 1947.

BLEED THROUGH– POOR COPY

FILE COPY

Office - Supreme Court, U.
FILED
NOV 4 1947
CHARLES E. MORE GROPL

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 426

STATE OF OHIO, EX REL. VAAD HACHINUCH HACHAREDI (TRADITIONAL EDUCATIONAL COUNCIL),
Appellant,

vs.

EDWIN C. BAXTER, WM. C. DUNLAP, SAMUEL E. KRAMER, FRED A. PEASE AND NORMAN KRICHBAUM, AS MEMBERS OF THE CITY PLANNING COMMISSION OF THE CITY OF CLEVELAND HEIGHTS, OHIO,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OF APPELLEES AGAINST JURISDICTION, INCLUDING MOTION TO DISMISS APPEAL AND AFFIRM JUDGMENT.

G. E. HARTSHORN,
HOWELL LEUCK,
Counsel at Law.

BLEED THROUGH- POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 426

STATE OF OHIO, EX REL. VAAD HACHINUCH HACHAREDI (TRADITIONAL EDUCATIONAL COUNCIL),

Appellant,

vs.

EDWIN C. BAXTER, WM. C. DUNLAP, SAMUEL E. KRAMER, FRED A. PEASE AND NORMAN KRICHBAUM, AS MEMBERS OF THE CITY PLANNING COMMISSION OF THE CITY OF CLEVELAND HEIGHTS, OHIO,

Appellees

STATEMENT OF APPELLEES AGAINST JURISDICTION, INCLUDING MOTION TO DISMISS APPEAL AND AFFIRM JUDGMENT.

Now come Edwin C. Baxter, Wm. C. Dunlap, Samuel E. Kramer, Fred A. Pease and Norman Krichbaum, as Members of the City Planning Commission of the City of Cleveland Heights, Ohio, Appellees, under authority of Rule 12, paragraph 3 of the Rules of this Court, and file this statement against jurisdiction, and at the same time move this Honorable Court for an order to dismiss the appeal and affirm the judgment of the Supreme Court of Ohio for the following reason:

The judgment of the Supreme Court of Ohio *does not draw into question the validity of a statute of any state* on the

ground of its being repugnant to the Constitution of the United States, as is asserted by Appellant.

Absent such a showing, this Court clearly has no jurisdiction under the sections of the Judicial Code set forth in Appellant's Statement as to Jurisdiction.

Appellant in its Statement as to Jurisdiction does not directly allege that a statute of the State of Ohio is drawn into question. It merely states that *a certain order of the Planning Commission of the City of Cleveland Heights,* a Municipal Corporation in the State of Ohio, is repugnant to the due process and equal protection clauses of Section 1 of the 14th Amendment of the Constitution of the United States. It is further asserted by Appellant that said Order is "Legislative in nature."

In view of this Court's extension of the meaning of "statute" to cover a Municipal ordinance, or even a decision of a board or commission, legislative in character, acting under authority of a state statute, it is encumbent upon Appellant to show that said Order of the Commission is legislative in nature, that is, that it has the attributes of legislation.

It appears from the pleadings and the record that the Council of the City of Cleveland Heights, acting under authority of Section 8366-7, *et seq.* of the Ohio General Code, duly enacted a comprehensive zoning ordinance, known as General Ordinance No. 2337, of the kind upheld in *Village of Euclid, Ohio* v. *Ambler Realty Co.,* 272 U. S. 365, 47 Sup. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1016, as is admitted on page 5 of Appellant's statement as to jurisdiction. *The validity of the ordinance itself has not been attacked in this case.* Only the Order of the Planning Commission is under attack.

The ordinance has divided the city into use districts, termed respectively U-1, U-2, U-3, U-4, U-5, U-6, U-7 and U-8.

The uses of property permitted in class U-1 districts are described as follows in Section 3 of the ordinance:

"*Class U-1 Uses (Single Family House).*

"(1) Single family dwelling.

"(2) Church, public or parochial school, public library, public museum. Private club except a club the chief activity of which is a service customarily carried on as a business. Community center building, philanthropic or eleemosynary institution other than a penal or correctional institution. Hospital sanitarium or boarding home for invalids other than insane or feeble minded. Public park, public playground, public recreational building, water tower or reservoir.

"(3) Farming. Non-commercial greenhouses, nursery truck garden."

Without going into detail, Section 3 of the ordinance permits in general, the following uses of property:

U-2—Two family dwelling.

U-3—Apartment house, hotel, boarding or rooming house, fraternity house.

U-4—Bank, office, studio, telephone exchange, retail stores.

U-5—Restaurant, theatres, police station, gasoline station, garage, repair shop, etc.

U-6—Subject to obtaining special permits, billboards, warehouse, ice manufacture, bottling works, laundry, dry cleaning, bowling alley, storage yard, etc.

U-7—Subject to obtaining special permit, greenhouse, cemetery, correctional institution, etc.

U-8—Prohibited uses are manufacturing and industrial operations not otherwise permitted, veterinary hospital, junk yard, explosives, storage, wholesale products market, etc.

Class U-1 uses are, of course, permitted in all use districts in the city.

We are particularly interested in Subdivision (2) under Class U-1 uses which applies to *Parochial Schools.*

Section 4 of the ordinance modified Subdivision (2) of Class U-1 uses, pertaining to churches, parochial schools, and the like, as follows:

> ***"Section 4, Single Family House District.***
>
> In a class U-1 district no building or premises shall be used and no building shall be erected which is arranged, intended or designed to be used, for a class U-2, U-3, U-4, U-5, U-6, U-7 or U-8 use. In a class U-1 district no building or premises shall be used and no building shall be erected which is arranged, intended or designed to be used except for a class U-1 use. In any part of a class U-1 district that is within a class A-1 district, no building shall be used and no building shall be erected which is arranged, intended or designed to be used as a semi-detached single family dwelling or double house. On a corner lot a double house may, however, be erected providing the two single family dwelling in such double house do not front on the same street.
>
> (2) In a class U-1 district no building shall be used and no building shall be erected which is arranged, intended or designed for a use enumerated in subdivision two (2) of class U-1 uses, unless such dwelling is located:
>
> (1) On a lot already devoted to a use enumerated in said subdivision, providing said devoted use is not a "non-conforming" use.
>
> (2) On a lot fronting on a portion of a street between two intersecting streets in which portion there exists premises devoted to a class U-7 use.
>
> (3) On a lot immediately adjoining or immediately opposite on the other side of the street from a class U-4 or U-5 district, or

BLEED THROUGH– POOR COPY

(4) On a lot determined by the City Planning and Zoning Commission after public notice and hearing to be so located that such building will in the judgment of the City Planning and Zoning Commission substantially serve the public convenience and welfare, and will not substantially and permanently injure the appropriate use of neighboring property."

Hence, it is apparent from the ordinance that Parochial schools are by no means barred from the City of Cleveland Heights. First, they are permitted in districts U-2, U-3, U-4, U-5, U-6 and U-7. Secondly, they are permitted even in a U-1 district on a lot already devoted to such uses. Third, they are permitted on a lot fronting on a portion of a street between two intersecting streets in which portion there exists premises devoted to a class U-7 use. Fourth, they are permitted on a lot immediately adjoining or immediately opposite on the other side of the street from a local retail store (U-4) or a commercial building of the type mentioned under class U-5. Fifth, they are permitted on a lot determined by the City Planning and Zoning Commission, after public notice and hearing, to be so located that such building will in the judgment of the City Planning & Zoning Commission substantially serve the public convenience and welfare, and will not substantially and permanently injure the appropriate use of neighboring property.

In this proceeding Appellant attempted to use the premises in question for a parochial school on the ground that such use would substantially serve the public convenience and welfare and would not substantially and permanently injure the appropriate use of neighboring property; but this application was denied.

Does such denial by the City Planning & Zoning Commission rise to the dignity of a statute? Does it rise to the dignity even of an Order of a state board or commission

"legislative in nature," as contemplated in cases cited by the Appellant in its Statement as to Jurisdiction?

First, we point out that the City Planning & Zoning Commission is not a State board; it is a *Municipal Commission.*

Secondly, *the Commission's function is not to legislate.* The Commission does not set up the use districts. The City Council has done that. The Commission's sole function in this particular case is merely to determine whether the public convenience and welfare would be served by granting the particular application and whether there would be a substantial and permanent injury to the appropriate use of neighboring property. Its function, we submit, is *purely administrative, not legislative.* It is a *fact-finding function.* All the Ohio Courts had to decide in this case was whether or not the Commission abused its discretion when it failed to find the facts requested by Appellant, namely, that the use of the premises in question in a single house district as a parochial school would substantially serve the public convenience and welfare, and would not substantially permanently injure the appropriate use of neighboring property.

We cite *New Orleans Water Works Company* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 8 Sup. Ct. 741, 31 L. Ed. 607, as an authority against jurisdiction here. In that case, the Supreme Court of the United States dismissed a writ of error (now called Appeal) from the Louisiana Court on the ground that no state legislation was involved. The Plaintiff held an exclusive franchise from the State of Louisiana to supply the City of New Orleans and its inhabitants with water, provided, however, that the City Council should not thereby be precluded from granting to any person or corporation "contiguous to the river" the privilege of laying pipes for his own use. The Council subsequently

BLEED THROUGH– POOR COPY

granted such a right to lay pipes from its factory to the river to the Louisiana Sugar Refining Co. Plaintiff contended in the State courts and in this Court that this was not contiguous to the river and that the action of the Council impaired the obligation of contract in violation of the Constitution of the United States. The State courts held against the Plaintiff which then attempted to appeal to this Court. The Supreme Court of the United States held that the action of the City Council was not a statute or legislation such as would permit the granting of the Writ of Error. The ground for the decision was that the action of the City Council, even though in the form of an ordinance, was not state legislation, *but was purely administrative.* The Court said at *125 U. S. 31:*

> "But the ordinance now in question involved no exercise of legislative power. The Legislature, in the charter granted to the plaintiff, provided that nothing therein should be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his or their own use. The Legislature itself thus defined the class of persons to whom, and the object for which, the permission might be granted. All that was left to the city council was the duty of determining what persons came within the definition, and how and where they might be permitted to lay pipes, for the purpose of securing their several rights to draw water from the river, without unreasonably interfering with the convenient use by the public of the lands and highways of the city. The rule was established by the Legislature, and its execution only committed to the municipal authorities. *The power conferred upon the city council was not legislative, but administrative,* and might equally well have been vested by law in the mayor alone, or in any other officer of the city. N. O., M. & T. R. Co. *vs.* Ellerman, 103 U. S. 166, 172 (26:1015, 1017); Day *v.* Green, 4 Cush. 433, 438. The permission granted by the city

> council to the defendant Company, though put in the form of an ordinance, was in effect but a license, and not a by-law of the city, still less a law of the state. If that license was within the authority vested in the city council by the law of Louisiana, it was valid; if it transcended that authority, it was illegal and void. But the question whether it was lawful or unlawful depended wholly on the law of the State, and not at all on any provision of the Constitution or laws of the United States."

Just as the City Council's action in the case above cited was not legislative, so the action of the Cleveland Heights Planning & Zoning Commission was not legislative but was purely administrative.

WHEREFORE Appellees respectfully submit that this Court has no jurisdiction of this case on appeal, and further pray that the appeal be dismissed and that the judgment of the Supreme Court of Ohio be affirmed.

Respectfully submitted,

G. E. HARTSHORN,
HOWELL LEUCK,
Attorneys for Appellees,
440 Leader Building,
Cleveland 14, Ohio,
CH 0137.

BLEED THROUGH– POOR COPY

No. 426. OHIO EX REL. VAAD HACHINUCH HACHAREDI (TRADITIONAL EDUCATION COUNCIL) *v.* BAXTER ET AL.,

762211 O—48—57

MEMBERS OF THE CITY PLANNING COMMISSION OF CLEVELAND HEIGHTS. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C. § 344 (a). Treating the papers whereon the appeal was allowed as a petition for a writ of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C. § 344 (c), certiorari is denied. *Ezra Shapiro* for appellant. *Howell Leuck* for appellees. Reported below: 148 Ohio St. 221, 74 N. E. 2d 242.